No. 83-212

IN THE

Supreme Court of the United States

October Term, 1983

WYNN OIL COMPANY,
Petitioner,

v.

SOUTHERN UNION EXPLORATION COMPANY OF TEXAS,
Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW MEXICO AND THE COURT OF APPEALS OF NEW MEXICO

PETITIONER'S REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

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In its Petition for Writ of Certiorari, Wynn Oil shows there is no legal or rational basis for holding it jointly liable with Wynn Exploration for one-half of the costs of Gallagher Prospect wells in which only Wynn Exploration – not Wynn Oil – elected to participate with Southern Union – *i.e.*, the second, third, fifth, and sixth wells. In its Brief in Opposition, Southern Union seeks to justify the arbitrary and capricious judgments below by claiming a basis of Wynn Oil's liability that was not pled, tried or utilized by the New Mexico courts, and is not supported by evidence or law.

Specifically, Southern Union claims (R. Br. 4, 19) that the September 8, 1975 letter agreement between Southern Union and Wynn Oil (P. Ex. 1) obligated Wynn Oil to pay seventy-five percent of the costs of all Gallagher Prospect wells, not simply the initial well identified in that document and any additional Gallagher Prospect well in which Wynn Oil expressly elected to participate in writing pursuant to paragraph 12 of the operating agreement between Southern Union and Wynn Oil (App. 63a). In other words, while Southern Union does not challenge Wynn Oil's showing that Wynn Oil did not elect to participate in any Gallagher Prospect well after the initial well identified in both the September 8, 1975 letter agreement and the operating agreement, Southern Union now claims that the New Mexico courts could and did disregard the election provisions of the operating agreement as to additional wells, because the September 8, 1975 letter agreement "did not limit Wynn Oil's participation to only one well, but referenced all of the property involved in the Gallagher Prospect and SXT and Wynn Oil joined without limitation' " (R. Br. 4).

Southern Union's new theory of liability would have required the New Mexico courts to hold Wynn Oil liable for all six Gallagher Prospect wells (*see* App. 3a, para. 8). However, the trial court found that neither Wynn Oil nor Wynn Exploration consented under paragraph 12 of the operating agreement to participate in the fourth well, Supco State No. 1 (*id.*, para. 7), and held them liable only for the initial well and the four additional wells in which Wynn Exploration had consented to participate (*id.*, para. 10).

Despite Southern Union's assertions regarding the September 8, 1975 letter agreement, the unassailable fact is that the document is silent as to the identity, location and number of wells in which Wynn Oil was to participate, except it does name and locate the initial well to be re-entered, and mentions an "option to re-enter" a second well (P. Ex. 1). It identifies the

subject properties (*i.e.*, "Gallagher Prospect, Section 8, 17 and E/2 Section 18, T-17-S, R-34-E, Lea County, New Mexico"), the initial well to be drilled (*i.e.*, "re-enter the Pennzoil United, Inc. #2 Gallagher . . . located in the SW corne of Section 8"), the amount of the overriding royalty interests, and the participation percentage of Wynn Oil (*i.e.*, "seventy-five percent") (*id.*). Finally, the September 8, 1975 letter agreement, which Wynn Oil accepted on October 4, 1975 –

> Enclosed . . . an operating agreement in duplicate with accounting procedures attached which we request you to execute and attest to and return one fully executed copy to us. (*Id.*)

The op g agreement, which was thus made a part of the Septembe 1975 letter agreement, identified the same Gallagher Prospect properties and initial well (P. Ex. 3, para. 7 at 3); clearly required Southern Union to give Wynn Oil thirty days written notice of its intenion to drill, rework, deepen, or plug back any additional wells (*id.*, para. 12 at 5; *see* App. 63a); and specified that a failure of Wynn Oil to affirmatively reply, in writing (*id.*; *see* App. 65a), that it elected to participate in the proposed operation would "constitute an election by that party not to participate in the proposed operation" (*id.*; *see* App. 63a), in which event Southern Union was to bear the "entire cost and risk of conducting such operations" (*id.*; *see* App. 64a).

In its first decision, the New Mexico Court of Appeals ruled that Wynn Oil could not be held liable for a share of the costs of any well on the ground that it was an unreleased assignor of Wynn Exploration by virtue of the November 18, 1975 letter agreement, since Wynn Oil was not a party to the agreement (App. 20a, 21a). Thus, that court destroyed any legal basis for holding Wynn Oil liable for any Gallagher Prospect well in which Wynn Exploration, but not Wynn Oil, had elected to

participate. Further, the New Mexico Court of Appeals ruled that Wynn Oil was liable only "on the basis of the documents it executed" – *i.e.*, the September 8, 1975 letter agreement and the enclosed operating agreement (App. 21a), which specified affirmative election requirements as to all Gallagher Prospect wells after the initial well described in both documents. Southern Union's claims to the contrary notwithstanding, there is not a shred of evidence indicating that Wynn Oil ever waived or was estopped to rely upon these affirmative election requirements, nor is there anything in the record indicating that Southern Union so claimed in its pleadings, at any trial, or on any appeal until now.

There is no legal basis suggested by the trial court's second judgment (App. 7a) or by the New Mexico Court of Appeal's second decision (App. 1a) for holding Wynn Oil liable on Gallagher Prospect wells in which it did not elect to participate. The new basis suggested in Southern Union's brief does not make those judgments any less arbitrary, capricious, irrational or unconstitutional.

Respectfully submitted,

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